

The Impact of Third Parties on Solicitor/Client Privilege¹

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Issue

Family Court Support Workers and other professional advocate who provide court support to women who have experienced violence are often asked by their clients to accompany them to their lawyer appointments. Women want their advocate present to provide emotional support, help them stay focused on the issues at hand, take notes and be able to debrief with them afterwards, especially with respect to any legal advice provided by the lawyer and tasks the lawyer has asked the woman to complete.

Some lawyers are reluctant to permit advocates to attend these meetings because they are concerned that the presence of a third party will destroy solicitor/client privilege.

This resource takes the position that the presence of professional advocates does not destroy this privilege and, in fact, enhances the lawyer-client relationship to the benefit of, primarily, the client, but also the lawyer.

Some definitions

Confidentiality: is the obligation not to *willingly* disclose information obtained in confidence from someone without that person's consent, unless required by law to do so. All information received in the role of providing legal services is confidential.

Privacy: is the right of individuals to determine when, how and to what extent they share their personal information.

¹ This resource draws heavily from "Privilege, Confidentiality, Third Parties Attending Interviews, Duty to Report, and Exceptions" prepared by Gerard J. Michaud, Lawyer Manager, Family Law Service Centre (Peel), August 16, 2012. Many thanks to Luke's Place volunteer lawyer Emilie Garant, who researched the case law and legal commentaries relied on in this resource.

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Personal Information: is any information that can be used to distinguish, identify or contact a specific individual. This information can include any individual's opinions or beliefs as well as facts about or related to the individual.

Privilege: is the requirement that a lawyer not divulge private communication with a client within the scope of providing legal services without the consent of the client. A lawyer cannot be compelled, even by a court, to divulge the content of these communications. Privilege applies only to private communication between a client and her lawyer in the course of the lawyer providing legal services. Privilege extends to communication by the lawyer to her/his staff. In other words, staff working with a lawyer who is providing legal services to a client are bound by privilege as are experts who have been hired by the lawyer. The right of privilege belongs to the client not to the lawyer.

Different kinds of third parties

Some of the uncertainty for lawyers about allowing third parties to be present during lawyer client meetings may be due to the fact that there are different kinds of third parties:

- A woman may bring a friend or family member with her as support when she is meeting with a lawyer
- If bullied to do so by her former partner, she may bring him to the appointment
- She may have children with her when she comes to the lawyer's office
- She may require language interpretation
- She may have a legal advocate

Family members, friends, children and the abuser all pose concerns for a lawyer with respect to privilege. They are not bound by any professional obligations to maintain confidentiality. They may not understand the impact of their presence on the woman's privileged relationship with her lawyer and may not understand the importance of maintaining that privilege. They could inadvertently share otherwise privileged information inappropriately. They have no formal or official role to play in the woman's case. There is no means to ensure that privilege is extended to communication shared by the woman with her lawyer when any of these third parties is present.

Interpreters and legal advocates present a very different situation to a lawyer. They are professionals who can assist the lawyer in doing her/his job better than the lawyer could do it without their assistance.

Extending privilege to interpreters and legal advocates

Both interpreters and legal advocates are professionals who have received special training. They work for organizations with strict rules with respect to privacy and confidentiality and have a rich and nuanced understanding of the importance of maintaining their clients' confidentiality. They have a formal role to play in the woman's case. They are not at risk of sharing privileged information inappropriately.

If the third party – whether an interpreter or a legal advocate – is present **to assist the client and for no other reason**, privilege should extend to that professional. This position is supported by both case law and legal commentary.³

To determine this, the lawyer may find it helpful to ask these three questions:

1. To the client: Do you need this person to be here to help you with this appointment?
2. To the third party: Are you here to assist the client and for no other purpose?
3. To the third party: Do you agree to keep what is said confidential?

There is no need for the lawyer to ask questions about the nature of assistance needed or to question the client about why she needs assistance: If the response to all three questions is yes, then the appointment is protected by privilege.

Necessity for the assistance of a third party is a low threshold test. Necessity in this context has been defined as "what is required to advance the client's interests".⁴ Where the client believes that their ability to communicate with the solicitor will be enhanced by a third party's company, then that company is necessary.⁵ This remains true whether the third party acts as an emotional or moral support to the client by their mere presence⁶, or whether the third party is necessary in the meeting for the purposes of facilitating actual communication between the lawyer and the client⁷.

³ *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc.*, [2004] 1 S.C.R. 456, note 17, paras. 48-49, LeBel J; and *Hannis v Tompkins*, 2001 CarswellOnt 4853, [2001] O.J. No. 5583 ["Hannis"]; and *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) ["Chrusz"]; and Hamish C. Stewart, *Halsbury's Laws of Canada - Evidence* (2014 Reissue) at HEV-178 "Express Waiver".

⁴ *Hannis*, *supra* note 3.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Chrusz*, *supra* note 3 at para 106 and 120.

If the third party facilitates the communication of legal advice between the lawyer and client, the privilege extends to the third party's communications with the lawyer and the client.⁸ Courts have applied this test rather liberally to different third party actors. Examples include professional facilitators in highly contentious meetings, psychologists using hypnosis to jog a client's memory of events, language interpreters and accountants in cases involving complex financial information. In such cases where third parties have a more active role in the meetings, as long as the third party's role can be described "as a conduit of advice from the lawyer to the client and as a conduit of instructions from the client to the lawyer"⁹, it is highly likely that solicitor-client privilege will remain intact.

A legal advocate would fit in this category given the assistance they provide to the client in understanding legal advice and process and to the lawyer who may not have experience serving individuals confronting complicating issues such as domestic violence.

A lawyer may wish to speak with the woman about the presence of the legal advocate without the legal advocate being present to satisfy her/himself that there has been no undue influence by the advocate and that the woman is freely choosing to have the advocate present for the meeting.

How a legal advocate can assist a woman who is experiencing trauma

While there is no need for a lawyer to probe the woman about why she needs assistance from a legal advocate, lawyers might find it useful to have some background information about trauma and its impact on women who have experienced abuse.

Most women, even after they leave their abusive partner, continue to experience threats, harassment, stalking and other abusive behaviours, including physical and sexual abuse, by him. This ongoing fear built on top of the years of abuse preceding separation, often leads to trauma, which can create challenges for her in engaging effectively with her lawyer. She may have difficulty concentrating on her case; listening to and retaining the information and advice her lawyer provides or accepting strategies that are presented to her. She may engage in avoidance behaviours or be unreliable in terms of showing up for appointments or completing paperwork when required. Her affect may be flattened, with the result that she appears disengaged or even uncaring about her children or the outcome of her case. She may make decisions that seem counterproductive to her best interests.

⁸ *Ibid.*

⁹ *Chrusz, supra* note 3.

A professional, trained legal advocate can assist the woman with managing her trauma, planning for meetings with her lawyer and note taking during those meetings, which frees the woman up to concentrate on the information and advice her lawyer is giving her. The notes taken by the legal advocate will be very useful to the woman after the appointment when she is not able to remember everything that was discussed.

How to conduct an appointment with a legal advocate in the room

If a woman is bringing her legal advocate to meetings with her lawyer, it is a good idea to spend part of the first meeting reviewing and confirming the role of the advocate and any terms or limitations on what the advocate can do.

From this point on, the lawyer can proceed as though the advocate were not even in the room. Communication should always be directed at the woman, not the advocate. Only the woman should provide instructions.

The duty to report

The statutory duty to report suspicions that a child may be in need of protection may be seen to pose a challenge if a legal advocate is present when a woman shares this information with her lawyer. This issue should be discussed in the initial appointment with the lawyer, the woman and the legal advocate.

Because solicitor-client privilege overrides the duty to report as set out in the *Child and Family Services Act*, section 72, the legal advocate may have a duty to report even if the lawyer does not.

In this case, the legal advocate will be bound by the policies and procedures of her organization, which could require her to report information she learned in a woman's appointment with her lawyer.

However, in the vast majority of cases, the woman will already be a client of the agency where the legal advocate works, and any disclosure about children will most likely have already been made in that context. In other words, it is very unlikely that the lawyer's appointment will be the first time the legal advocate has heard the woman say something that raises the duty to report.

Conclusion

While there are some challenges with respect to maintaining privilege when a legal advocate is present at meetings between a woman and her lawyer, the benefits far outweigh the concerns. Any lawyer representing women who have experienced abuse should consider seriously the advantages of including the woman's legal advocate in all appointments. Key points to consider include:

- It is necessary to clearly distinguish between professional third parties such as interpreters and legal advocates and non-professional third parties such as family members, friends and children
- Legal advocates can make the lawyer's job easier by managing many of the not strictly legal issues the woman is dealing with and by assisting her to function effectively despite the presence of trauma
- When a third party is present exclusively for the purpose of assisting the client, privilege extends to those meetings
- The lawyer should speak with the woman without the legal advocate present, to ensure there has not been any undue influence

Both women and their lawyers report that when a legal advocate is involved in lawyer-client meetings the experience for both the woman and the lawyer and the legal outcomes are significantly improved.